Mastika Jaya Timber Sdn Bhd v Shankar a/l Ram Pohumall

HIGH COURT (KUCHING) — SUIT NO 22–229 OF 2009-I
RAVINTHRAN JC
29 MARCH 2010

Civil Procedure — Res judicata — Issues, similarity of — Prayers in striking out application repeated in setting aside application — Judge in setting aside application dismissing similar prayers on basis of similarity and/or duplicity — Prayers not determined or adjudicated upon — Whether such prayers res judicata at subsequent hearing of striking out application — Whether striking out application ought to be dismissed on grounds of res judicata

Legal Profession — Remuneration — Counsel's fees — Oral agreement contemplating payment in event of success in suit — Whether such agreement champertous, illegal and against public policy — Whether such oral agreement enforceable

Legal Profession — Retainer — Written retainer — Whether oral contract for fees could contradict written retainer — Whether oral contract for fees contravened s 15 of the Advocates Ordinance of Sarawak (Cap 110) — Whether evidence of such oral contract barred under s 92(d) of the Evidence Act 1950

The defendant's law firm represented the plaintiff and two others in an earlier suit against their business associates. In that earlier suit, the said firm successfully obtained for the plaintiffs an ad interim injunction on an ex parte basis. However, at the inter partes hearing, the High Court refused to continue the injunction. The plaintiff thus filed the instant suit against the defendant for, inter alia, a refund of the retainer fee paid and to recover the amounts claimed against the business associates in the earlier suit. The plaintiff pleaded that there was an oral contract that the defendant would refund the retainer fee of RM200,000 if he was unsuccessful in obtaining the interlocutory injunction. After the plaintiff's writ was served on the defendant, the defendant applied to strike out the suit (encl 7). However, before encl 7 was heard, the plaintiff entered default judgment against the defendant for failure to file the defence. The defendant thus filed an application to set aside the default judgment (encl 29). In encl 29, the defendant repeated the prayers made in encl 7. When encl 29 came up for hearing the judicial commissioner ('JC') allowed the defendant to set aside the default judgment but dismissed the similar prayers for striking out as made in encl 7. At the subsequent hearing of

encl 7 the plaintiff argued that the application was res judicata because the JC had dismissed the similar prayers when determining encl 29.

Held, allowing the defendant's application with costs:

(1) The JC's judgment in the setting aside application (encl 29) led to the irresistible conclusion that the prayers sought in the instant striking out application (encl 7) were not adjudicated. The striking out prayers were not adjudged in the setting aside proceedings. Even if it was argued that the striking out prayers properly belonged to the setting aside application (encl 29), the court would dismiss such argument since the issues in a setting aside application are: (i) whether a judgment is irregular; and (ii) if irregular, whether the judgment discloses a defence on the merits. In the instant case, there was no justification for the striking out application (encl 7) to be dismissed on the basis of res judicata (see paras 7–8).

(2) The words of the written retainer were categorical and unequivocal in respect of the immediate and outright entitlement of the defendant's legal firm to the fee of RM200,000. The retainer made it clear that such fee was not contingent on the outcome of the litigation. The plaintiff's oral contract contravened s 15 of the Advocates Ordinance of Sarawak that, inter alia, required agreements for fees to be in writing in order to be valid, as evidenced by the written retainer in the instant case. Further, s 92(d) of the Evidence Act 1950 barred the admission of oral evidence to contradict an agreement required by law to be in writing. On this ground alone, the plaintiff's claim should be struck out (see para 12).

(3) The alleged oral agreement was champertous, illegal and against public policy. The plaintiff thus could not maintain its action. It was pointless to allow the plaintiff's claim to proceed to full trial as the plaintiff would not be able to enforce the oral collateral agreement, even if proved (see para 14); *Otech Pakistan Pvt Ltd v Clough Engineering Ltd and another [2006] SGCA 46* [2007] 1 SLR 989 followed; *In re Attorney and Solicitor Act, 1870* (1875) 1 Ch D 573 followed; *Mokhtar Ngah & Co lwn Yee Seng Plantations Sdn Bhd* [2009] 1 LNS 823 referred; *Quill Construction Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor* [2003] 6 MLJ 279 referred.

(4) Although the plaintiff's inter partes application to continue its injunction against its former business associates had been dismissed, its suit against them was still pending. Thus the plaintiff's claim against the defendant for the amounts owing by its former business associates was premature and speculative (see para 15).

[Bahasa Malaysia summary

Firma guaman defendan mewakili plaintif dan dua yang lain di dalam guaman terdahulu terhadap rakan seniaga mereka. Di dalam guaman terdahulu tersebut, firma tersebut berjaya memperoleh injunksi ad interim bagi plaintif

atas dasar ex parte. Walau bagaimanapun, pada pendengaran inter partes, Mahkamah Tinggi menolak untuk meneruskan dengan injunksi tersebut. Plaintif oleh itu memfailkan guaman ini terhadap defendan untuk, antara lain, pemulangan fi retainer yang dibayar dan untuk mendapatkan semula jumlah yang dituntut terhadap rakan seniaga di dalam guaman terdahulu. Plaintif merayu bahawa tidak ada kontrak lisan bahawa defendan akan memulangkan fi retainer sebanyak RM200,000 jika dia berjaya memperoleh injunksi interlokutori. Selepas writ plaintif diserahkan kepada defendan, defendan memohon untuk membatalkan guaman tersebut (lampiran 7). Walau bagaimanapun, sebelum lampiran 7 didengar, plaintif memasukkan penghakiman ingkar terhadap defendan atas kegagalan memfailkan pembelaan. Defendan oleh itu memfailkan permohonan untuk mengetepikan penghakiman ingkar tersebut (lampiran 29). Di dalam lampiran 29, defendan mengulangi permohonan yang dibuat di dalam lampiran 7. Apabila lampiran 29 didengar pesuruhjaya kehakiman ('PK') membenarkan defendan mengetepikan penghakiman ingkar tersebut tetapi menolak permohonan yang serupa untuk pembatalan seperti yang dibuat di dalam lampiran 7. Pada perbicaraan lampiran 7, plaintif menghujah bahawa permohonan tersebut adalah res judicata kerana PK telah menolak permohonan serupa apabila memutuskan lampiran 29.

Diputuskan, membenarkan permohonan defendan dengan kos:

(1) Penghakiman PK dalam permohonan mengetepikan (lampiran 29) membawa kepada kesimpulan tidak boleh sangkal bahawa permohonan yang dipohon di dalam permohonan pembatalan ini (lampiran 7) tidak dibicarakan. Permohonan untuk pembatalan juga tidak dibicarakan di dalam prosiding pengetepian. Walaupun ia dihujahkan bahawa permohonan pembatalan adalah di bawah permohonan pengetepian (lampiran 29), mahkamah akan menolak hujahan sedemikian kerana isu-isu di dalam permohonan pengetepian adalah: (i) sama ada penghakiman adalah tidak cacat; dan (ii) jika cacat, sama ada penghakiman tersebut mendedahkan pembelaan atas merit. Di dalam kes ini, tidak ada justifikasi untuk permohonan pembatalan (lampiran 7) ditolak atas dasar res judicata (lihat perenggan 7–8).

(2) Perkataan-perkataan retainer bertulis adalah mutlak dan jelas berkaitan dengan hak terus dan nyata firma guaman defendan kepada fi RM200,000. Retainer menjadikannya jelas bahawa fi sedemikian bukan bergantung kepada keputusan litigasi tersebut. Kontrak lisan plaintif bertentangan s 15 Ordinan Peguam Bela (Sarawak) (Cap 110) bahawa, antara lain, memerlukan perjanjian untuk fi dibuat dalam bentuk bertulis untuk menjadikannya sah, seperti yang dibuktikan oleh retainer bertulis di dalam kes ini. Selanjutnya, s 92(d) Akta Keterangan 1950 dihadkan oleh kebolehterimaan keterangan lisan untuk menyangkal

perjanjian yang diperlukan oleh undang-undang untuk ditulis. Atas alasan ini sahaja, tuntutan plaintif harus dibatalkan (lihat perenggan 12).

(3) Perjanjian lisan yang didakwa adalah 'champertous', tidak sah dan bertentangan dengan polisi awam. Plaintif oleh itu tidak boleh mengekalkan tindakan ini. Adalah tidak wajar untuk membenarkan tuntutan plaintif diteruskan ke perbicaraan penuh kerana plaintif tidak akan boleh melaksanakan perjanjian kolateral lisan, walaupun dibuktikan (lihat perenggan 14); *Otech Pakistan Pvt Ltd v Clough Engineering Ltd and another [2006] SGCA 46* [2007] 1 SLR 9 diikut; *In re Attorney and Solicitor Act, 1870* (1875) Ch D 573 diikut; *Mokhtar Ngah & Co v Yee Seng Plantations Sdn Bhd* [2009] 1 LNS 823 dirujuk; *Quill Construction Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor* [2003] 6 MLJ 279 dirujuk.

(4) Walaupun permohonan inter partes plaintif untuk meneruskan injunksi terhadap rakan seniaga lamanya telah pun ditolak, guamannya terhadap mereka masih menunggu perbicaraan. Oleh itu tuntutan plaintif terhadap defendan untuk jumlah yang terhutang oleh rakan seniaga lamanya adalah pramatang dan spekulatif (lihat perenggan 15).]

Notes

For cases on counsel's fees, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2030–2033.

For cases on issues, similarity of, see 2 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6076–6078.

For cases on retainer generally, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2051–2081.

Cases referred to

Aratra Potato Co Ltd v Taylor Joynson Garrett (a firm) [1995] 4 All ER 695, QBD (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

Attorney and Solicitors Act, 1870, In re (1875) 1 Ch D 573 (folld)

Mokhtar Ngah & Co lwn Yee Seng Plantations Sdn Bhd [2009] 1 LNS 823, HC (refd)

Otech Pakistan Pvt Ltd v Clough Engineering Ltd and another [2006] SGCA 46 [2007] 1 SLR 989, CA (folld)

Quill Construction Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor [2003] 6 MLJ 279; [2006] 2 CLJ 358, HC (refd)

Wallersteiner v Moir (No 2) [1975] QB 373, CA (refd)

Legislation referred to

Advocates Ordinance of Sarawak (Cap 110) s 15

Evidence Act 1950 s 92, 92(d)

Legal Profession Act 1976 s 112
Rules of the High Court 1980 O 14A, O 18 r 19, O 19 r 7(1), O 32 r 1, O 92 r 4

Lim Heng Choo & Anthony Tai (Lim & Lim Advocates) for the plaintiff.
Sunny Si (Si & Associates) for the defendant.

Ravinthran JC:

[1] This is an application by the defendant to strike out the suit of the plaintiff under O 32 r 1, O 18 r 19, O 19 r 7(1), O 92 r 4, O 14A of the Rules of the High Court 1980.

BRIEF FACTS

[2] The defendant is a partner in the law firm of Messrs Thomas, Shankar Ram & Co Advocates. The said law firm represented the plaintiff in another case (Suit No 22–133 of 2009-I). The plaintiff herein was the third plaintiff in that suit. One Jeffrey Law, a director of the plaintiff and his wife were the first and second plaintiffs. They had sued their Chinese partners over some joint venture deal which had gone sour. I shall not go over the details of that suit save to say that the plaintiffs in Suit No 22–133 of 2009-I had sought an urgent injunctive order against their erstwhile business associates. The plaintiffs' claim in that suit was for the sum of RM795,903.73. At the initial stage, the plaintiffs were successful in their ex parte application for injunction. Later they also obtained an ad interim injunction. However when the inter parte injunction application was finally adjudicated, the plaintiffs failed to obtain the interlocutory injunction. According to the defendant, the plaintiffs blamed him for the loss. It is not in dispute that the plaintiffs had paid the defendant retainer fee of RM200,000. This instant suit is by the third plaintiff (Mastika Jaya Timber Sdn Bhd) in Suit No 22–133 of 2009-I against their own solicitor for:

(a) Refund of the retainer fee of RM200,000.

(b) The sum of RM795,903.73 which the plaintiffs had claimed in Suit No 22–133 of 2009-I against their former business associates.

[3] In addition, the plaintiff also claiming general, aggravated and exemplary damages, interest and costs. The basis of the plaintiff's claim for a refund of the retainer fee is as follows. The plaintiff pleaded that there was an oral contract that the defendant would refund the retainer fee of RM200,000 if he was unsuccessful in obtaining the interlocutory injunction that they sought. In respect of the other claims, the plaintiff pleaded that the defendant was incompetent and unprofessional in his work in that he had made uncharitable

remarks about the judge who dismissed the injunction application, attacked opposing lawyers in affidavits and had also engaged a Singapore lawyer without his consent and in breach of the law relating to legal practice in Sarawak.

PRELIMINARY ISSUE

[4] Counsel for the plaintiff submitted that the striking out application (encl 7) should not be dismissed outright because of the principle of res judicata. The res judicata argument arose in this way. After the writ was served by the plaintiff, the defendant filed this application to strike out the claim. Before the application was heard, the plaintiff entered default judgment against the defendant for failure to file the statement of defence. The defendant filed an application (encl 29) to set aside the judgment in default. The defendant repeated the prayers and grounds for striking out the writ of summons and statement of claim in the setting aside application. As the res judicata argument is based on the decision of the learned judicial commissioner, I find it necessary to reproduce the relevant excerpts from her written ruling. The learned judicial commissioner made the following observation at the outset:

> It is to be observed that the prayers on the striking out of the pleadings are identical to that found in the earlier application for striking out and I am at loss as to why there is any compelling need or any need at all to file two applications for the same reliefs for it served no purpose other than to confuse and add on to the cost of the proceedings.
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> … I agree with Mastika Jaya's counsel that there is clearly duplicity and multiplicity in the first application for striking out and the present application before me.
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> … I am not amused by being bombarded with unnecessary prayers especially when, with a little bit of patience, the earlier application will run it's own course.
>
> … I agree therefore that the inclusion of the prayers on the striking out is bad for duplicity.

[5] She then proceeded to rule as follows:

> I would therefore allow the application to have it set aside but would in view of the earlier filing of encl 7 for striking out dismiss the similar prayers in this application.

[6] Counsel for the plaintiff argued that the instant striking out application is res judicata because of the above holding of the learned judicial commissioner. Chong Siew Fai CJ (Sabah and Sarawak) in the oft-quoted case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 distilled the law on the principle of res judicata as follows:

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an *estoppel per rem judicature*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and

their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*.

[7] The excerpts that I cited from the judgment of the learned judicial commissioner leads to the irresistible conclusion that the prayers sought in this application were not adjudicated. She clearly said that the defendant should not have included the striking out prayer in the application for setting aside judgment in default as the same had been included in the instant application. She found that this amounted to duplicity of proceedings. Therefore, she dismissed the striking out prayer. In view of her observation that this enclosure would be heard in due course and her direction to fix it for hearing before me after she set aside the judgment in default, it is as plain as pike staff that she declined to adjudicate on the striking out prayer. The striking out prayer was therefore not adjudged in that proceeding. In the premises, there is no justification for the argument that the matter is res judicata. Even if the defendant had submitted that the matter is res judicata, because it properly belonged to the subject matter of the setting aside application, I would have no hesitation in dismissing this argument. The issues in a setting aside application are whether:

(a) a judgment is irregular; and

(b) if it is regular, whether it discloses a defence on the merits.

[8] Therefore, it cannot be argued that the striking out prayer of the defendant 'belonged' to the setting aside application. In the premises, the submission of counsel for the plaintiff that the instant application should be dismissed on the ground of res judicata is without merit.

STRIKING OUT APPLICATION

[9] The defendant has applied to strike out the suit of the plaintiff on numerous grounds. In summary they are as follows:

(a) That a contract of retainer under s 15 of the Advocates Ordinance of Sarawak (Cap 110) should been in writing.

(b) That the agreement was champertous.

(c) That there is duplicity because the defendant is claiming for balance fees in Originating Summons 24–395 of 2009-II and that the plaintiff could have pursued this claim in that action.

(d) That this application is a collateral attack on the judgment of Justice Linton Albert who dismissed the injunction application.

(e) That an advocate is clothed with immunity in the performance of his professional duties.

(f) That there is a double claim as the plaintiff is still claiming the sum of RM795,903.73 against his former business associates.

(g) That the retainer was between the plaintiff and the law firm of Thomas, Shankar & Co Advocates and not with the defendant.

(h) That duty of care was not pleaded.

CLAIM FOR REFUND OF RM200,000

[10] Section 15 of the Advocates Ordinance of Sarawak (Cap 110) reads as follows:

> No agreement entered into by any advocate … with any person retaining or employing him, respecting the amount and manner of payment for the whole, or any part of, any past or future services, fees, charges, or disbursements in respect of business done, or to be done, by such advocate, shall be valid unless it is made in writing signed by such person.

[11] The defendant has exhibited the written retainer that was signed by the director of the plaintiff, one Jeffery Law. The document refers to the work that defendant was to undertake in prosecuting the suit on behalf the plaintiff. In respect of fees, it states at para 5 as follows:

> 5 As for Paragraph 3.1 above (1st Major Stage our Professional fees and charges are an initial non-refundable fee of RM200,000 with the following further fees at appropriate stages:

[12] The point to note in the above paragraph is that the fee of RM200,000 is not contingent on the outcome of the litigation. The words of the above cited paragraph are categorical and unequivocal in respect of the immediate and outright entitlement of Thomas, Shankar & Co Advocates to the fee of RM200,000 upon acceptance of the brief. However, the plaintiff has pleaded that the fee of RM200,000 is subject to the defendant being successful in obtaining the interlocutory injunction in question. The plaintiff's director deposed that an oral collateral representation was made to that effect. Therefore, the plaintiff's case for refund of the RM200,000 is dependent on the validity of this oral contract. The defendant has argued that this oral contract has contravened s 15 of the Advocates Ordinance. He also submitted that s 92 of the Evidence Act 1950 bars the admission of such evidence to contradict a written agreement. In my opinion, the clear words of s 15 read together with written retainer are sufficient to conclude the case against the plaintiff. Section 15 enacts that an agreement in respect of fees payable to an

advocates must be in writing in order to be valid. In the instant case, the written retainer ('SR1') exhibited by the defendant in the affidavit in support, is evidence of such agreement. SR1 is not alleged to be a forgery by the plaintiff. However, the plaintiff is relying on a collateral oral agreement which is invalid under s 15. The further point to note is that s 92(d) of the Evidence Act 1950 bars the admission of oral evidence to contradict an agreement that is required by law to be in writing. Since s 15 provides that agreement in respect of fees between a client and an advocate must in writing, no useful purpose would be served by allowing the plaintiff to go to full trial and attempt to adduce evidence of the oral contract. On this ground alone, the claim of the plaintiff should be struck out.

[13] I will now consider the ground that the purported oral agreement if any is champertous and illegal. This argument is premised on the allegation of the plaintiff that the defendant is not entitled to the fee of RM200,000 unless the application for interlocutory injunction was successful. In the case of *Otech Pakistan Pvt Ltd v Clough Engineering Ltd and another [2006] SGCA 46* [2007] 1 SLR 989, the Singapore Court of Appeal said as follows in respect of the doctrine of champerty:

> As *Cheshire, Fifoot and Furmstoris Law of Contract* (Butterworths Asia, Singapore and Malaysian [*1001] (2nd Ed, 1998)) put it at p 639, champerty exists where one party agrees to aid another to bring a claim on the basis that the person who gives the aid shall receive a share of what may be recovered in the action. Public policy is offended by such an agreement because of its tendency to pervert the due course of justice. In *Re Trepca Mines Ltd (No 2)* [1963] Ch 199 Lord Denning explained this public policy in the following oft cited passage at pp 219–220:
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> The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law.

[14] Under s 112 of the Legal Profession Act 1976 which is applicable in West Malaysia, no advocate shall enter into any agreement which stipulates for or contemplates payment only in the event of success in such suit, action or proceeding. There is no similar provision in the Sarawak Advocate Ordinance. However, the common law definition of champerty includes such agreements. In *In re Attorney and Solicitors Act, 1870* (1875) 1 Ch D 573 (cited in *Mokhtar Ngah & Co lwn Yee Seng Plantations Sdn Bhd* [2009] 1 LNS 823), Jessel MR said that a statutory provision that invalidated any agreement which stipulates for or contemplates payment only in the event of success in such suit, action or proceeding is meant to provide against champerty (see also *Aratra Potato Co Ltd*

v Taylor Joynson Garrett (a firm) [1995] 4 All ER 695 and *Wallersteiner v Moir (No 2)* [1975] QB 373 that were cited by counsel for the defendant). Maintenance and champerty are not actionable torts in England since 1997. However they can still be applied to declare an agreement void on the ground of public policy (see the judgment of James Foong FCJ in *Quill Construction Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor* [2003] 6 MLJ 279; [2006] 2 CLJ 358). As a champertous agreement, the alleged oral agreement is illegal and against public policy. Therefore, the plaintiff in this case cannot maintain this action. On this ground as well it is pointless to allow the case to go to a full trial as the plaintiff would not be able to enforce the so called oral collateral agreement even if it is proved.

CLAIM FOR THE SUM OF RM795,903.73

[15] This amount represents the claim of the plaintiff against their former business associates in Suit No 22–133 of 2009-I. The interlocutory injunction application by the plaintiff had been dismissed. However, the suit itself is pending. The plaintiff has alleged professional incompetence against the defendant. Even if for sake of argument, incompetence is proved against the defendant, the claim is premature and speculative as the said suit is still pending. It would also amount to a double claim on the part of the plaintiff.

[16] In view of my findings above, I find it unnecessary to consider all the other grounds raised by the defendant. The defendant also sought for an order for the balance of the fees purportedly due. However, he did not file a counterclaim in his statement of defence. Therefore, this claim cannot be considered.

[17] In conclusion, I rule that the alleged oral collateral agreement (even if proven) is illegal as it contravenes s 15 of the Sarawak Advocates Ordinance. I also find that it is a champertous agreement as payment of fee is contingent upon success in the litigation. Therefore, the said agreement is unenforceable. In the premises, I shall strike out the claim of the plaintiff. Order in terms of prayer (1). Costs to be taxed unless otherwise agreed.

Defendant's application allowed with costs.

Reported by Andrew Christopher Simon